

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

FILED BY S
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US DISTRICT COURT
WD OF TN JACKSON

FLOYD LEE PERRY,)
)
Petitioner,)
)
VS.)
)
VIRGINIA LEWIS, Warden,)
)
Respondent.)

ORDER GRANTING MOTION TO REOPEN TIME TO FILE
NOTICE OF APPEAL

Petitioner Floyd Lee Perry filed a *pro se* petition pursuant to 28 U.S.C. § 2254. On May 10, 2005, the Court issued an order dismissing the petition, denying a certificate of appealability, certifying that an appeal would not be taken in good faith and denying leave to appeal *in forma pauperis*. Judgment was entered on May 13, 2005. On September 8, 2005, petitioner filed a motion to reopen the time to file an appeal, pursuant to Federal Rule of Appellate Procedure 4(a)(6).

Rule 4(a)(6) authorizes a district court to reopen the time to file an appeal under certain limited circumstances:

The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

- (A) the motion is filed within 180 days after the judgment or order is entered or within 7 days after the moving party receives notice of the

entry, whichever is earlier;

- (B) the court finds that the moving party was entitled to notice of the entry of the judgment or order sought to be appealed but did not receive the notice from the district court or any party within 21 days after entry; and
- (C) the court finds that no party would be prejudiced.

The docket reflects that the petitioner's copies of the Order of Dismissal and Judgment were returned to the Clerk's office marked "Undeliverable—Not at this Institution" on May 19 and May 20, 2005, respectively. On July 13, 2005, the Clerk received a letter from the petitioner dated July 11, 2005, which included a change of address. A Staff Attorney for the Court responded to the petitioner's letter on August 18, 2005 and mailed copies of the docket sheet, the Order of Dismissal and the Judgment to his new address. Petitioner has submitted a photocopy showing that the documents were received in the prison's mail room on August 23, 2005.

It is evident that the petitioner did not receive notice of the Order of Dismissal and Judgment until at least August 23, 2005, more than three months after entry on the docket. His Motion to Reopen was signed and placed in the prison mail system on either August 29 or August 30, 2005¹ so that, under the rule of Houston v. Lack, 487 U.S. 266 (1988), it must be considered filed on August 30 at the latest. Therefore, the motion was filed within seven days after petitioner received notice of the Order of Dismissal and entry of Judgment, and is timely under Rule 4(a)(6). In addition, there will be no prejudice to any other party by

¹ Petitioner dated the certificate of service August 30; however, the notary public dated her certification August 29.

reopening the time for petitioner to file an appeal, as the habeas petition was summarily dismissed without service on the respondent pursuant to Rule 4 of the Rules Governing § 2254 Cases.

Petitioner's motion is GRANTED. In accordance with Fed. R. App. P. 4(a)(6), petitioner is hereby allowed fourteen (14) days after the date this order is entered on the docket in which to file a notice of appeal.

As indicated, the Court denied leave to proceed on appeal *in forma pauperis* in the Order of Dismissal. Therefore, when petitioner files his notice of appeal he must either pay the entire \$255 appellate filing fee or file a motion to proceed *in forma pauperis* in the Sixth Circuit Court of Appeals. See Fed. R. App. P. 24(a)(4)-(5).

IT IS SO ORDERED.



JAMES D. TODD
UNITED STATES DISTRICT JUDGE



DATE



Notice of Distribution

This notice confirms a copy of the document docketed as number 9 in case 1:05-CV-01052 was distributed by fax, mail, or direct printing on September 13, 2005 to the parties listed.

Floyd Lee Perry
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Honorable James Todd
US DISTRICT COURT